



## Welcome

As Chairman of the Ropes & Gray Sports Law Group, I welcome you to the Spring 2009 edition of our *Sports Law Today*. In recent years, the legal issues surrounding intercollegiate sports have grown almost as quickly as those sports' popularity. The landscape surrounding intercollegiate sports, on issues ranging from eligibility to compensation, is constantly evolving. The challenging economic environment we find ourselves in has only served to increase the focus on many of these issues. Given our long history of representing public and private higher education institutions—and the individuals employed at those institutions—in all aspects of their affairs, our experience in collegiate sports legal matters is a natural outgrowth of our firm's core strengths. We hope you find this edition informative and useful. Please contact me or any of my colleagues if you have any questions or if we can be of service to you. ■

Sincerely,  
Dennis Coleman  
*Chairman, Sports Law Group*

## NCAA Investigations: Effective Preparation for Favorable Outcomes

*By Christopher Conniff and Matt Elliott*

In every season, unexpected and unavoidable obstacles can disrupt a team's path to victory—injuries, unlucky bounces or bad calls (to name a few). But an NCAA rule compliance inquiry has the potential to be the most destructive impediment to success of all, especially if it is mishandled. By planning for the unexpected and following some basic guidelines, schools can deal effectively with NCAA investigations, present their programs in the best possible light, and minimize downsides such as penalties and reputational harm.

No matter how strong, a compliance program cannot prevent allegations of rule infractions. Despite the best efforts of a school, administration, coach, and student-athletes to adhere to the NCAA's bylaws, it is still possible that violations will occur or be alleged. Sometimes the institution becomes aware of the potential problem, either through rumors, whistleblowers, friends (or enemies) of the program, or from a myriad of other sources. Other times, the first hint of a potential problem is an unexpected call from an investigator in the NCAA's Membership Affairs group.

In the event that the call comes from the NCAA, **Rule No. 1** is listen and avoid the temptation to say anything substantive about the case. Without complete knowledge about the matter at hand, no one should be staking out positions that may subsequently need to be corrected. This could seriously hurt a school's credibility once all the facts have been determined. Anyone who might be in a position to receive such a call should be

instructed to listen carefully and gather as much information as possible about the allegations being investigated. Learning even the smallest details about the focus of an investigation will help determine how to investigate and, if warranted, defend against the allegations. However, it should not come as a surprise if the NCAA investigator discloses next to nothing since its investigators routinely only state that they are pursuing allegations of possible rules violations. In the event that the investigator starts asking questions or probing into a matter, remember that *NCAA Bylaw 32.3.6 provides a right to have an attorney present during the interview process*. Availing oneself of this right should not be a cause for concern or embarrassment.

While visions of front page headlines and penalties may result from that first call, do not panic; instead, gather the facts. **Rule No. 2** is to gather the facts to bring the issues into focus and prepare to address them. Not understanding the facts is one of the quickest ways to lose credibility with the NCAA and exacerbate the problem. Having command of the facts allows for a real assessment of the situation and, in some instances, reveals important mitigating factors. This may seem like an easy and obvious step, but it is surprising how many times it is overlooked, whether because of a fear of "turning over too many stones" or a failure to take an initial complaint serious enough because the matter is considered "no big deal."

The investigation of the facts can be done by an institution's compliance officer or outside counsel but should never be left to the coaching staff or anyone else directly connected to a team. Having an objective and trained professional handle the investigation will increase the likelihood that the investigation is done right, enhance the legitimacy of the process in the eyes of the NCAA, and minimize the long-term harm to the chemistry of the team. While using outside counsel to conduct the investigation adds additional expense, it is the wisest step in a number of cases. The most obvious is if any chance exists that a compliance officer or athletic department official may be a witness to any of the facts at issue. It may also be a good idea if the allegations involve student-athletes on a number of different teams (e.g., an allegation of academic wrongdoing) or if the institution has had recent problems with the NCAA. In addition, hiring outside counsel can help an institution insulate itself from potential future allegations of impropriety or scapegoating by employees involved in the investigation—the sort of issues that were raised in the case between Marshall University and its former compliance director, which settled earlier this year.

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## NBA Age Minimum Incites Maximum Controversy

By Lindsey R. Goldstein

The Collective Bargaining Agreement signed between the National Basketball Association (NBA) and the National Basketball Players Association (NBPA) in July 2005 established a minimum age for NBA draft eligibility. Both U.S. and international players must be at least 19 years old during the calendar year of the draft they wish to enter, and all U.S. players must be at least one NBA season removed from their high school graduation. The CBA is set to expire following the 2010-11 season, with a league option to extend it an additional year.

Recent speculation suggests that, when the parties next meet at the bargaining table, NBA Commissioner David Stern will push to raise the minimum age requirement to more closely align the NBA with other professional sports leagues. The National Football League requires draft-eligible players to be three NFL seasons removed from high school. Major League Baseball (MLB) employs a multi-tiered structure for its first-year player draft: high school graduates who have not yet attended college are draft eligible, but those players who choose to attend a four-year college prior to the draft must stay at least three years or until they reach age 21.

In pushing for a minimum age requirement during the last CBA negotiation, the NBA argued that an additional period of coaching and experience, presumably at the college level, would allow players to refine their skills and to gain physical and mental maturity that a player entering the league straight from high school might lack. However, the compromise reflected in the CBA—requiring just one year between a player's high school graduation and entering the draft—has been widely criticized by NBA executives, college coaches and athletic directors, and academic administrators alike.

These critics contend that such an abridged requirement does a disservice to the athletes, the basketball programs and the institutions themselves. Commentary is especially pointed with respect to the academic requirements of a player who enters college with the intent to declare for the draft after his freshman season. Typically, such a player need only pass two classes in the first semester to earn academic eligibility, and need not attend a single class in the second semester to remain academically eligible for the entire season. Furthermore, a player who plays only a single year can effectively disrupt a coach's recruiting scheme for several seasons.

These are just some of the reasons, leading up to the last CBA negotiation, that the National Association of Basketball Coaches urged the adoption of a three-year requirement between high school and entering the draft. Since the rule's enactment, NCAA President Myles Brand has made it clear to Commissioner Stern that the NCAA would prefer a requirement of at least two years. Given the opinions of and criticism levied by all parties involved, it is safe to say that both the NBA and the NBPA will be scrutinizing the existing rule during the next negotiation. One of four outcomes is likely: the parties will leave the rule as-is; they will raise the minimum age as the Commissioner has suggested he prefers; they will modify the rule by adopting a structure similar to that of MLB; or they could eliminate the rule

entirely and adjust the incentive framework that currently confronts high school players who contemplate declaring for the NBA draft. One such adjustment would be to implement economic incentives that would more highly compensate rookies who attended college for a minimum number of years. By doing so, the NBA could inherit the more skilled players they desire, and the players may find themselves in less of a rush to cash in on their first big pay day.

No matter the ultimate agreement, the current minimum age requirement is certain to garner considerable attention when the NBA and NBPA meet to negotiate the next CBA. As its General Counsel, Ropes & Gray will continue to work closely with the National Association of Basketball Coaches (NABC) in considering alternatives to the existing rule and will keep the coaching fraternity informed of all developments. ■

## Protecting Yourself and Your Family in Contract Negotiations

By Ryan Schaffer

*“Coach X signs a 5 year contract with Y University for Z dollars.”*



That's it. That's generally what makes it onto the ESPN scrolling ticker and into the transactions section of the newspaper. What is often the culmination of many months of negotiation, not to mention a lifetime of blood, sweat and tears spent on the court and on the road, is neatly reduced into one line when a new contract is signed.

While this is okay for media purposes, during contract negotiations, it is critically important to remember that the “other provisions” of the contract are as important as that top line number. In fact, for the protection of your family's long term interests, these may be the most important provisions.

Other categories of compensation may provide you with opportunities for additional income while allowing a university athletic department to remain within its budget. A sampling of these categories includes: television/radio, deferred compensation, incentives for performance (on and off the court), public appearances, shoes and apparel, just to name a few. Some universities prefer to limit these categories and put all of the compensation into base salary, while others prefer to spread compensation out among various categories, which may allow booster groups and other organizations to contribute.

Our own mortality is a difficult subject to discuss and plan for, but broaching this topic during contract negotiations is the best way to ensure that your loved ones are taken care of in the event that something happens to you. A number of alternatives for life insurance exist through the university and in the private marketplace. As part of a compensation package, we often request that the university take out a policy in the coach's name, with the university paying the premiums throughout the term of the agreement. Additionally, including specific language in the contract surrounding exactly

what happens to the contract in the event of death or disability is the best way to give yourself peace of mind that your family is protected.

Just as you may be uneasy discussing what happens in the event of death or disability, termination is an unpopular discussion topic during negotiations. Perhaps you are getting your first head coaching opportunity, or you are coming to a new school with a fresh start and high expectations. Still in the “honeymoon” period, neither you nor the university anticipates a termination. Yet the plain fact is that most coaches are terminated at some point in their careers, and if a coach waits until termination to try and negotiate the terms of his/her exit, it is often too late.

Most contracts allow the university to terminate a coach either “for cause” or “without cause.” If a coach is to be terminated “without cause” (generally for not winning enough games), the university should pay him the remainder of the money owed under the contract. While most universities will pay the coach his base salary times the unexpired term of the agreement in this situation, a coach should seek to have other categories of compensation (television, apparel, etc.) included in the calculation. The university may seek to pay this amount over an extended period (often the remaining term of the contract). It is preferable for a coach to receive this amount in a lump sum within 30 days of termination, as it makes a clean end to the relationship, precludes the effects of a mitigation provision, and gets the money in your hands earlier, to start earning interest.

A university will often seek a “mitigation provision,” under which its responsibility to pay the coach is offset by any compensation the coach receives from a new job. Mitigation provisions are common, but the mitigation should be limited to earnings from new employment as a head coach, not for employment as an assistant coach or as a broadcaster.

Most contracts provide that if a coach is terminated “for cause,” the university’s obligations to the coach cease immediately upon termination. The negotiation of the definition of “cause” is perhaps the most crucial element of a contract. A tight definition of cause may be the difference between receiving the remainder of the money owed under your contract and receiving nothing. A definition of cause should include “materiality” qualifiers and the ability of the coach to cure any perceived breach of the contract upon written notice by the university.

This article is meant only to give you a very high level view of some of the issues you should be thinking about and discussing with your attorney or representative during a negotiation. We are always available to discuss any of these or other issues as they arise.

*This article was reprinted with permission from the Fall 2008 edition of TimeOut magazine, a publication of the National Association of Basketball Coaches. ■*

## Complicated Tax Rules That Can Affect Nonqualified Deferred Compensation

*By Jennifer Rikoski*



Most athletic directors and coaches should already be speaking to their tax advisors about two provisions of the Internal Revenue Code that address “nonqualified deferred compensation” because they can have far-reaching effects on a college or university employee’s compensation—Section 457(f) and Section 409A.

Broadly, nonqualified deferred compensation includes an amount that you have a legally binding right to receive in a future year, even if the right is conditional or unvested. In addition to traditional deferred compensation plans, nonqualified deferred compensation may also cover bonuses, reimbursements, severance payments, certain fringe benefits, and other types of income. Most highly compensated employees of a college or university have compensation arrangements that include one or more elements of nonqualified deferred compensation.

For employees of tax-exempt organizations, like colleges and universities, Section 457(f) requires that deferred compensation be included currently as taxable income unless the employee’s right to the compensation remains unvested. Although we await additional guidance from the IRS, generally, under Section 457(f), a right to compensation is unvested if the employee must continue to work to receive the payment. This means, for example, that if an employee has the right to receive funds held in a deferred compensation account whenever he or she stops working at the college or university, those amounts could be currently taxable, even though the employee may not receive the payment for several years.

Additionally, employees should evaluate whether their deferred compensation payments comply with the strict timing and payment rules under Section 409A in order to avoid becoming subject to current taxation at ordinary income rates, an additional 20% excise tax, and interest. The regulations issued under Section 409A also require that nonqualified deferred compensation arrangements be in writing, and, as of January 1, 2009, any existing agreements must have been updated to comply with Section 409A. Some types of compensation may be exempt from the Section 409A rules, such as “qualified plans” (e.g., 401(k), 403(b), or 457(f) retirement plan), vacation leave, and payments made within 2-1/2 months after the end of the year in which the employee’s right to the payment vests.

If you have not done so already, it is important to consult with your tax advisor about whether these rules potentially apply to you. ■

## NCAA Investigations

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After deciding who will conduct the investigation, **Rule No. 3** is to map out an investigative plan and follow it. This plan will vary based on the allegations at issue but normally will include the collection of relevant documents and interviews of the interested parties. In some instances, it will make sense to retain counsel for the student athlete and/or coach involved in the allegations. It is important to remember that these young men and women (and often the coaches) have never been interviewed in such a formal setting and may have a number of questions about the process.

Providing a lawyer under these circumstances will make the student athlete as comfortable as possible during the interview, and better prepare him/her to give a clear and truthful account of the issues. Having a witness properly prepared will also help the student athlete and/or coach adhere to the NCAA's expectation of complete honesty and cooperation when responding to an NCAA investigation. These principles can be found throughout the 2008-2009 NCAA Division I Manual including Section 2.4: The Principle of Sportsmanship and Ethical Conduct, Section 10.1: Unethical Conduct, and Section 32.3.7.2: Responsibility to Cooperate, which states "*at the beginning of an interview, [the interviewee] shall be advised that refusing to furnish information or providing false or misleading information to the NCAA, conference or institution may result in an allegation that the individual has violated NCAA ethical conduct legislation.*" In other words, if a witness appears to be lying to or withholding information from the NCAA, this can lead to additional violations. Based on our own experience, the candor and completeness of the student athletes' and coaches' testimony can have a tremendous positive impact on an investigator's view of the allegations and have excellent results for both the involved individuals and the institution.

The investigative plan may also include fact-gathering from individuals outside the institution. Having a dialogue with relevant external persons has the advantage of broadening the institution's understanding of the facts and aiding with preparation for interviews. At the same time, it is important to balance the risk of public exposure that may result from contacting external sources. At no point should a coach or student athlete discuss the matter with anyone outside the school or attempt to gather additional information from external sources.

Finally, **Rule No. 4** is to review the NCAA bylaws in detail to identify the bylaws that are relevant to the fact pattern, which will likely result in gaining a better understanding of the NCAA's focus. From there, attention should turn to developing an analysis of the history and intent of the rules, as well as interpretations and decisions that may be relevant to the current investigation. This basic research will be very useful in the event that the institution later must defend itself against formal charges or file an appeal.

There are numerous potential outcomes of an NCAA investigation, but by following these four simple rules, an institution can effectively manage the inherent risk. Just as additional repetitions in the weight room or one last run-through at practice can make the difference between winning and losing, how an institution readies itself and its personnel for an inquiry can determine the outcome of the investigation. ■

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